DUNLOP INDUSTRIES EMPLOYEES UNION

v.

DUNLOP (M) INDUSTRIES BHD.

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR CJ (MALAYA)
GEORGE SEAH SCJ
EUSOFFE ABDOOLCADER SCJ
[CIVIL APPEAL NO. 481 OF 1986]
24 JANUARY 1987

LABOUR LAW: *Breach of provision of collective agreement - Industrial Relations Act 1967 - Section 56(2)(b) - Application for certiorari to quash award - Whether the Industrial Court has power to order reinstatement.*

The appellant entered into a collective agreement with the 1st respondent in 1982. Article 42(a) of the collective agreement provides that the 1st respondent will give such advance notice as soon as it is reasonably possible to the appellant in writing of any redundancy or retrenchment but such notice shall not be less than 2 months prior to retrenchment. The appellant received a letter from the 1st respondent on 24 June 1986 explaining the need to retrench some 114 of its employees (who were members of the appellant). Notices of retrenchment were issued to 112 employees that very day after a meeting between the parties. After the appellant protested, the 1st respondent reiterated its position and stated that the retrenched employees would receive 2 months' salary in lieu of notice in addition to retrenchment benefits and other accrued benefits including retirement gratuity.

The Industrial Court (the 2nd respondent), acting under s. 56(2)(b) of the Industrial Relations Act 1967 ("the Act") ordered the reinstatement of the employees without loss of seniority or pay. The High Court, upon an application by the 1st respondent for *certiorari*, quashed the award of the Industrial Court on the ground that failure to give notice under Article 42(a) was procedural and insufficient to attract the application of s. 56(2)(b) of the Act by way of restitution and the matter of retrenchment involved a question of non-employment and therefore clearly gave rise to a trade dispute which was to be resolved by conciliation and if necessary by reference to the Industrial Court under s. 26.

Held:

[1] The right of the 1st respondent to retrench its employees is not disputed and the purpose of the advance notice in relation to any redundancy or retrenchment under Article 42(a) is to give time and make way for mutual consultation and negotiation to prevent a trade dispute from resulting.

[2] In dealing with a complaint of non-compliance under s. 56 of the Act, the Industrial Court has the power to order proper rectification or restitution for a contravention of a term of the collective agreement.

[Appeal allowed with costs. Order of trial Judge set aside.]

Case referred to:
Foo Loke Ying & Anor. v. Television Broadcasts Ltd. & Ors. [1985] CLJ (Rep) 122

Legislation referred to:
Industrial Relations Act 1967, ss. 17(2), 26(2), 30(3), (4), (5), (6), 52(2), 56(1), (2)(b)

For the appellant - B. Lobo; M/s. Lobo & Associates
For the respondents - C.V. Das (R. Rajasingam with him); M/s. Shook Lin & Bok

JUDGMENT

Eusoffe Abdoolcader SCJ:

The crux of the case in the matter before us which is *res integra* concerns the semantic content and ambit of the functional application by the Industrial Court of the provisions of s. 56, and more particularly subsection 2(b) thereof, of the Industrial Relations Act 1967 ("the Act") in considering a complaint of non-compliance with a provision for advance notice to a trade union under a collective agreement taken cognizance of by it prior to a retrenchment exercise implemented *instanter* in breach thereof and a *fait accompli* at the time of the complaint. This will involve and require a plain consideration of the terms of s. 56 and other germane provisions of the Act, and to avoid tautology, all references to statutory provisions in this judgment relate to the Act. We would add that the Industrial Court was not a necessary party to have been joined as a second respondent to the application for *certiorari* and even less so as the second respondent in this appeal, and for the purposes of this judgment we will refer to Dunlop Malaysia Industries Berhad as the respondent.

The appellant and the respondent entered into a collective agreement in 1982 which was taken cognizance of by the Industrial Court in Cognizance No. 67 of 1983. The collective agreement in accordingly by virtue of s. 17(1) binding on the parties and their integrants, and in accordance with the provisions of subsection (2) of s. 17 it is an implied term of the contract between the respondent and its employees that the rates of wages to be paid and the conditions of employment to be observed under the contract shall be in accordance with the agreement unless varied by a subsequent agreement or a decision of the Industrial Court. Article 42 of the collective agreement deals with retrenchment, and para. (a) thereof provides that the respondent will give such advance notice as soon as it is reasonably possible to the appellant in writing of any redundancy of retrenchment but such notice shall not be less than two months prior to retrenchment. Paragraphs (b) to (e) of Article 42 provide for the several matters on which any retrenchment exercise will have to be premised and for the entitlement of retrenched employees to specified benefits. Article 42(a) is clearly designed to facilitate mutual consultation and negotiation to avert retrenchment and would appear to be a corollary to give effect to the provisions of Clauses 20 and 21 of the Code of Conduct for Industrial Harmony which the Industrial Court can take into consideration in making an award by virtue of s. 30(5A).

The appellant received a letter at about 2.30 p.m. on 24 June 1986 from the respondent explaining the need to retrench some 114 of its employees who are members of the appellant due to a sharp decline in its business, and after a meeting between the parties, notices of retrenchment were issued at about 3.30 p.m. that very day to 112 employees. The appellant wrote to the respondent the next day protesting on the basis of a complaint of the breach of Article 42(a) of the collective agreement and asking for the withdrawal of the letters to the appellant and the employees concerned. The respondent replied on 27 June reiterating its position and stating that the retrenched employees would receive two months' salary in lieu of notice in addition to retrenchment benefits and other accrued benefits including retirement gratuity. The appellant then on the same day lodged a complaint with the Industrial Court of non-compliance by the respondent with the provisions of Article 42(a) of the collective agreement.

The Industrial Court heard the appellant's complaint of non-compliance and held in an award handed down on 14 August 1986 that the appellant had made out its case and accordingly under the provisions of s. 56(2)(b) ordered that the 112 employees of the respondent purported to have been retrenched were to be reinstated without loss of seniority or of pay, subject to the conditions that (1) they were to report to the respondent for duty within one week of the date of the order, and (2) all moneys purported to have been paid for their retrenchment, if paid, were to be refunded to the respondent in full on the day they reported for duty. Pursuant to this award 56 employees were reinstated by restoring them on the payroll of the respondent but the 56 others failed to comply with the second condition imposed in the award as they were unable to refund the retrenchment payments they had received.

The respondent then, after obtaining leave therefor, applied to the High Court for *certiorari* to quash the award of the Industrial Court which Harun Hashim J did on 29 October 1986. The case presented for the respondent was basically to the effect that the question of non-compliance with Article 42(a) related to a retrenchment exercise and accordingly gave rise to a trade dispute and should have been dealt with as such under the Act and not as a case of non-compliance with a term of the collective agreement between the parties , while that for the appellant was that this was a clear case of non-compliance with a term of the collective agreement to justify a complaint to the Industrial Court under s. 56 and an order for relief under the provisions of sub-section (2) thereof. The learned Judge has not given any written judgement on the reasons for quashing the award but indicated when recording his order in his notebook his finding that the Industrial Court had acted in excess of jurisdiction by ordering reinstatement when dealing with a complaint under s. 56, the failure to give notice under Article 42(a) was procedural and insufficient to attract the application of s. 56(2)(b) by way of restitution and the matter of retrenchment involved a question of non-employment and therefore clearly gave rise to a trade dispute which was to be resolved by conciliation and if necessary by reference to the Industrial Court under s. 26.

For the purposes of considering the proper approach for the determination of the issue presented before us in relation to the requisite provisions of the Act in this appeal against the order made by the High Court, we can do no better than refer to and adopt this passage in the judgment of this Court in *Foo Loke Ying & Anor. v. Television Broadcasts Ltd. & Ors.* [1985] CLJ (Rep) 122:

> We should perhaps reiterate that the starting point in statutory interpretation is to consider the ordinary meaning of the word or phrase in question, that is its proper and most known signification. Some three months ago Lord Scarman in delivering the leading judgment of the House of Lords in *South West Water Authority v. Rumble's* [1985] 1AC 609 said (at p. 619):
>
> > '... the language of the two paragraphs consists of ordinary English words which possess by their very imprecision the flexibility which is the hallmark of the English language, and which is one of the reasons for the survival of English as a living and worldwide tongue. I have no doubt that it would be contrary to the legislative purpose of the enactment to restrict or refine their breadth and flexibility in the context of this legislation, which has to cover a wide range of circumstances and situations present and future. A restrictive interpretation of the legislature's language would defeat the broad purpose of this innovative and reforming statute.'
>
> We are of the view that the provisions of the Act under consideration before us call for a purposive and literal construction which is one which follows the literal meaning of the enactment where that meaning is in accordance with the legislative purpose and applies where the literal meaning is clear and reflects the purposes of the enactment ...

> The provisions of the Act are abundantly clear to refute any resort to a purposive and strained construction which requires a strained meaning where the literal meaning is not in accordance with the legislative purpose. In *Reg. v. Broadcasting Complaints Commission, Ex parte Owen* [1985] 1 QB 1153 (at p. 1174), it was held that the converse is not correct, namely, that it is legitimate to adopt a purposive construction so as to prevent the application of a statute to a situation which on its purely literal construction it would apply. This is what we think the appellants are seeking to persuade the Court to do.

The respondent does not dispute the fact that there has been a breach of the provisions of Clause 42(a) of the collective agreement. In this regard, two essential considerations assume vital significance. First, the appellant is not challenging the right of the respondent to retrench its employees but is only complaining of its failure to give the requisite advance notice provided for in Clause 42(a). If the complaint were of the breach of the provisions of any of the other paragraphs of Clause 42 of the collective agreement or if any dispute were to arise as to their implementation or application, the position would be entirely different as then there would clearly be a trade dispute within the connotation thereof in the definition of that term in s. 2 since they relate to principles affecting redundancy or retrenchment as such. And second, the advance notice in relation to any redundancy or retrenchment under para. (a) of Clause 42 is to be given to the appellant as the trade union of employees and a party to the collective agreement. As we have pointed out earlier, the purpose of the advance notice under Clause 42(a) must surely be to give time and make way for mutual consultation and negotiation in line with the provisions of the Code of Conduct for Industrial Harmony so as to obviate and abort any imminent trade dispute as a result.

The complaint of non-compliance with an award or collective agreement taken cognizance of is made under s. 56(1) and the Industrial Court can then give the relief specified in subsection (2) of that section. In regard to the matter before us where retrenchment was implemented as an accomplished fact but carried out in breach of the provisions of Article 42(a) of the collective agreement for advance notice to the appellant of not less than two months prior to the retrenchment, it is manifestly obvious that the only provision in s. 56(2) which can apply in such circumstances is para. (b) thereof which empowers the Industrial Court to "make such order as it deems fit to make proper rectification or restitution for any contravention of any term of such award or collective agreement". Section 56 must be read, construed and understood in the light of s. 52(2) which prescribes that the provisions of the Act relating to trade dispute other than s. 26(2) and s. 30(4) shall apply to any matter referred to or brought to the notice of the Industrial Court under the Act. It accordingly follows that in dealing with a complaint of non-compliance under s. 56 the Industrial Court has all the powers with which it is invested in relation to trade disputes other than the two excepted provisions of the Act specified in s. 52(2). The provisions of s. 30(5) and (6) will also therefore equally apply in considering a complaint under s. 56.

Against the back drop and in the context of the several provisions of the Act we have referred to and discussed, it is abundantly clear that the Industrial Court could in the circumstances of the complaint of non-compliance which is the subject matter of this appeal make the order that it did for the retrenched employees to be reinstated, and this order was properly made in accordance with the provisions of s. 56(2)(b) for the purposes of making proper rectification and restitution for a contravention of a term of the collective agreement. It is in our view both an exercise of the power of rectification as well as restitution - rectification (that is to say, correction, putting right and making good) of the situation that had developed as a result of the contravention of Clause 42(a) by the respondent and

restitution in restoring the *status quo ante as a terminus a quo* to lay open the way to the respondent to re-institute a retrenchment exercise if it is so minded but this time in compliance with the provisions of Clause 42 of the collective agreement. We would think that any other construction would emasculate and render impotent and otiose the provisions of s. 56 in circumstances such as those before us.

Mr. Das for the respondent however contends that any such construction would be to give a power to the Industrial Court not intended or envisaged by the Act. We think that, perhaps understandably, he contends to this effect as he cannot do otherwise in the light of his submission that non-compliance with Article 42(a) in the event gave rise to a trade dispute connected with the matter of employment or non-employment of workmen within the definition thereof in s. 2. When however we asked him, if indeed he was correct in his contention, what manner of relief s. 56(2)(b) would then encompass, he submits that it must necessarily refer to monetary compensation - a point not taken in the Court below and raised before us for the first time. We must wholly dissent, as, descending to mundane reality from the ethereal heights of hypothesis and speculation, this argument cannot actually withstand even casual scrutiny.

We must reiterate once again that the advance notice under Article 42(a) of the collective agreement is required to be given to the appellant and not to the individual employees affected. The retrenched employees would get their requisite salary in lieu of notice in addition to retrenchment benefits and other accrued benefits including pro-rata bonus and retirement gratuity. If then restitution in s. 56(2)(b) is to mean compensation in terms of money, it must mean compensation to the appellant as the trade union and not to its individual members who are affected by the exercise. How then is this compensation to be assessed and quantified and what is the measure of damages? How would any monetary award compensate the appellant for the deprivation of the opportunity of consultation and negotiation on behalf of its members prior to the implementation of retrenchment envisaged by the Code of Conduct for Industrial Harmony? And how would any compensation to the appellant as a trade union in any event, even if ascertainable, benefit its members affected as a result of the breach of the provision for advance notice to their trade union? These questions have only to be posed to manifest the imponderables involved, and merely raising these queries and hypothesizing on the answers, or rather the lack of any effective or rational ones, would suffice to evince *ex visceribus* the intrinsic inanity of the very suggestion of monetary compensation in the circumstances of this case. We would add that, if indeed restitution in s. 56(2)(b) can in fact mean compensation in the circumstances of the matter before us as contended for the respondent, the upshot at the very least would be to open the door to abuse in spawning and countenancing an unbridled licence for legalised breach of one or more terms of a collective agreement in such circumstances with virtual impunity and only on the sanction of a minimal imposition grossly incommensurate with the benefits the employer would reap by virtue of non-compliance therewith.

We are accordingly of the firm view that the provisions of s. 56(2)(b) and 52(2) clearly empowered the Industrial Court to make the award it did in dealing with the complaint of the appellant of non-compliance by the respondent with the provisions of Article 42(a) of the collective agreement. Our conclusion is wholly in consonance with the principle that differences and disputes in industrial relations *ex necessitate rei* require to be determined and disposed of as expeditiously as possible - a prescriptive postulate statutorily endorsed and affirmed in s. 30(3). Section 56 was clearly enacted to effectuate this requirement and end, as otherwise recourse would have to be had to a reactivation *ab initio* and repetition

of the whole tedious exercise of the conciliation and consequential process under s. 26 by reference to the Industrial Court once again for resolving a trade dispute in a clear and uncontroverted case of mere non-compliance with a term of an award or collective agreement taken cognizance of by the Industrial Court.

In the event and for the reasons we have adumbrated, at the end of the day after hearing argument we allowed this appeal with costs here and below and set aside the order of the learned Judge which of course means that the respondent's application for *certiorari* to quash the award of the Industrial Court made on 14 August 1986 stands dismissed. The deposit lodged in Court by way of security will be paid out to the appellant.

Also found at [1987] 1 CLJ 232